Supreme Court, U.S.
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No. 96-237

In The

Supreme Court of the United States

October Term, 1995

DAVID LOCKMILLER,

Petitioner,

v.

SUPERIOR COURT OF SANTA CLARA COUNTY,

Respondent.

To The Court Of Appeal Of The State Of California
Sixth Appellate District

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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POINT IN OPPOSITION #1.

"Although Petitioner claims to have had two conversations with an unidentified insurance representative regarding settlement in March 1988, and although Petitioner claims to have retained an expert at the time, Petitioner took no further steps to prosecute this legal malpractice action for more than three years and it appeared that Petitioner had abandoned this case." (Brief in Opposition to Petition for Writ of Certiorari – Page 1.)

REPLY TO POINT IN OPPOSITION #1.

As counsel of record for the real parties in interest at the Superior Court of Santa Clara County, the Sixth District Court of Appeal, the California Supreme Court, and the U. S. Supreme Court, Mr. Noel B. Gassett must have been aware of the following argument and referenced evidence which was presented to the Sixth District Court of Appeal in the Petition for Writ of Error Coram Vobis:

> On March 3, 1988 and again on March 17, 1988, I was contacted by telephone by man claiming to be an insurance adjustor agent of defendant-attorney's malpractice insurance carrier, working for Weil & Company in Oakland. **His claim that he was an insurance adjustor is the reason that I spoke to the man; as an insurance adjustor, presumably he had the authority to fashion an out-of-court settlement.** I informed the opposition's agent that since filing the legal malpractice action, I personally had located and retained already an expert witness in employment law to evaluate my case and that I was not willing to settle the case at "10 cents on the dollar."
>
> In the first telephone conversation on March 3, 1988, I initially agreed to meet directly with the agent at my apartment on the following Tuesday to discuss my case. After considering myself the advisability of such a meeting, I canceled it the

next morning by calling the number given to me by the agent and leaving a message to that effect since he was not in the office at that time.

In the second telephone conversation of March 17, 1988, to the opposition agent's request that I provide a copy of the book manuscript referred to in the complaint, I asked the agent why he did to get a copy of the book manuscript from A-D. According to the agent, attorney-defendant had claimed to the malpractice insurance carrier to have either misplaced the "book manuscript" or returned it to Plaintiff. To the agent's repeated request for a copy of the book manuscript. I responded that I was willing to do so on the condition that my legal counsel approved. At a scheduled meeting with my expert witness in March, 1988 to discuss his initial evaluation of my book manuscript, I specifically asked him how I should respond to the request. My legal counsel did not approve of the opposition proposal. I notified the agent of attorney-defendant's malpractice insurance carrier personally by telephone within a few days of the legal counsel that I had received from my expert witness and intended to follow." (See Exhibit U for a copy of Plaintiff-Petition's phone bill indicating the phone calls placed to the opposition agent.)

As proof that the meeting with his expert witness took place on March 29, 1988, I have provided a copy of a cash receipt acknowledging payment to my expert witness on that day. Further evidence of my active pursuit of this lawsuit is my March 31 dated letter to my expert witness suggesting specific employer publications that should be sought. (See Exhibit V for a copy of the cash receipt and my letter.)

(Petition for Writ of Error Coram Vobis pages 22 - 23)

In Exhibit U, accompanying the petition to the appellate court, the opposition's agent was identified specifically as Rayford Reed (spelled phonetically). For opposition legal counsel to now describe opposition's own agent to the members of the U. S. Supreme Court as "unidentified" is, at best, disingenuous.

Petitioner, in the Petition for Writ of Error Coram Vobis to the Sixth District Court of Appeal, challenged the misconduct of the opposition's legal counsel at the uncontested hearing before the law and motion judge on the motion to dismiss:

> It should be presumed by this court of appeal that the "right hand of defendant," his legal counsel, must know what the "Left hand of defendant," his malpractice insurance carrier, is seeking. And any information gathered by that "left hand" naturally must be presumed to fall into the "right hand." Or, stated more concretely and to the point, this Court should presume that the information gathered by the paralegal agent of the legal malpractice insurance carrier in direct telephone conversation with Plaintiff-Petitioner following the filing of the malpractice complaint must have been communicated to the defendant and his legal counsel. Thus, the factual representation by both Attorney-Defendant and his legal counsel to the law and motion judge that "Plaintiff has done absolutely nothing with this case since serving this Compalint" was known by them to be false.
>
> However, both Attorney-Defendant and his legal counsel purposely violated their legal duties as officer's of the court to permit and enable the law and motion judge to decide the issue of involuntary case dismissal in a fair and just manner. In the non-adversary hearing on the motion to dismiss involuntarily this case, both attorney-defendant and his legal counsel

> knew that their false statements concealed from the court the truly relevant and substantial facts on this issue before the court. And most importantly, these attorneys knew that their false statements, if believed, would be misleading to the Court in weighing its decision on whether or not to grant the order of involuntary dismissal of Plaintiff's case in Plaintiff-Petitioner's absence.
>
> Knowledge by the law and motion judge for the trial court of 1) Plaintiff-Petitioner's personal selection and hiring of an expert witness within two months of filing this legal malpractice lawsuit, 2) Plaintiff-Petitioner's stated willingness to the opposition to negotiate a settlement at more than "10 cents on the dollar," and 3) Plaintiff's stated willingness and demonstrated eagerness to engage in discovery proceedings might have resulted in postponement of the Court's decision on the Motion for Discretionary Dismissal until Plaintiff could be heard. This, of course, is a determinative test of what the unanimous California Supreme Court cited and considered to constitute extrinsic fraud in *In re Marriage of Park*, supra, 342.: "The concealment of facts which, if revealed to the trial court, might result in the postponement of an adjudication until the absent party can be heard constitutes extrinsic fraud.

(Petition for Writ of Error Coram Vobis pages 44 - 46)

The complete quotation from the California Supreme Court in *Park*, referenced in the immediately proceeding paragraph, is as follows:

> A final judgment may be set aside by a court if it has been established that extrinsic factors have prevented one party to the litigation from presenting his or her case. (*Oliver v. Grace* (1942) 19 Cal.2d 570, 575 [122 P.2d 564, 140 A.L.R. 1328].)

> The grounds for such equitable relief are commonly stated as being extrinsic fraud or mistake. However, those terms are given a broad meaning and tend to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing. It does not seem to matter if the particular circumstances qualify as fraudulent or mistaken in the strict sense. (Cites omitted) for example, in *Landon v. Landon* (1946) 74 Cal.App.2d 954 [169 P.2d 980], the husband was stranded in China at the outbreak of World War II and consequently, was unable to attend the dissolution proceeding. Aware of her husband's predicament and his unsuccessful attempts to return to this country, the wife concealed those facts from the court. As a result of this concealment, a default judgment was entered. When the husband asked the trial court to vacate its judgment, the court granted his motion and the Court of appeal affirmed. **It held that '[t]he concealment of facts which, if revealed to the trial court, might result in the postponement of an adjudication until the absent party can be heard constitutes extrinsic fraud.'** (Id., at p. 957) (emphasis added) *In re Marriage of Park,* (1980) 27 Cal. 3d 337, 342; 165 Cal Rptr. 792, 612 P.2d 882.

(Petition for Writ of Error Coram Vobis pages 42 - 43)

Thus, according to the California Supreme Court opinion in *Park,* opposition legal counsel was under an affirmative duty to not mislead the trial court into believing that "[p]laintiff has done *absolutely nothing with this case since serving the complaint . . . "* when he possessed specific knowledge to the contrary.

As to opposition legal counsel's new false statement to the U. S. Supreme Court that "Petitioner took no further steps to prosecute his legal malpractice action for

more than three years," the following conclusive evidence to the contrary was presented previously to the Sixth District Court of appeal. This information, therefore, should now be within opposition legal counsel's sphere of knowledge.

> The malpractice attorney who agreed to draft the complaint on this "short fuse" legal malpractice action did so only on the condition that it be filed in proprius persona. Within two days of completion of the malpractice attorney's complaint preparation, I personally filed the lawsuit and personally arranged that the defendants be served *immediately.*
>
> Shortly thereafter, I personally located and retained an expert witness in employment law, Dan Bacon, to evaluate fully my case. Following the reading of the book manuscript by the expert witness and a personal interview with me regarding the merits of my case, he wrote a letter to my malpractice attorney requesting that she subpoena specific records and documentation from A-P's former employer. (See Exhibit W.)
>
> When I called my malpractice attorney to arrange payment for this service, she told me that she was refusing to prepare the subpoena but would not state any reason for her refusal to do so. I then requested, through his paralegal secretary, that the expert witness draft the necessary subpoena. The expert witness never responded to the request and on October 4, 1988, the manuscript was returned to me by certified mail. The accompanying cover letter stated that since my malpractice attorney had never responded to his request that she issue the discovery subpoena, he assumed his services as an expert witness were no longer needed. No reference was made in the letter to my request

that he issue the discovery subpoena. (See Exhibit X.)

I made another attempt in November, 1989 to put together a legal team of an expert employment law witness and a malpractice attorney. This effort failed as well although I did get the agreement of a published expert in employment law to act as an expert witness in the malpractice case. Also failing was my attempt to early 1991 to move forward with this case by asking the expert witness that reviewed my manuscript in 1989 to issue the necessary subpoena against my former employer. (See Exhibit Y for written communications exchanged between expert witness Mark S. Rudy and Petitioner-Plaintiff.)

With no other choice available to me, I enrolled in 1991 in the paralegal program at the University of San Francisco in order to educate myself well enough in the basics of the necessary law, i.e. civil procedure before trial, employment law, and malpractice law, to pursue this case. For the first course, Civil Procedure Before Trial, I had to meet personally with the instructor to discuss acceptance into her class without two standard prerequisites. I was granted permission to enter her class on the condition that I would never discuss any aspect of my case in class. We shook hands on the deal and I kept my part of the agreement.

I had a full time job and attended night school. The class assignment work was extensive and had to be done nights and on the weekends. Taking one course each quarter for four successive quarters, I received "high-passes" in the three of the four courses: Civil Procedure Before Trial I & II and Legal Research & Writing I (see Exhibit Z for a copy of a letter from the University of San Francisco indicating the grades

> received by Petitioner-Plaintiff). Without these basic courses and the knowledge thus obtained, I knew that I stood absolutely no chance whatever against an experienced lawyer, even in the civil procedure before trial aspects of this case.
>
> As an objective measure of my ability, intent, and resolve to pursue this case, I offer into evidence a special permission, case-related class project from my fourth and final course in the paralegal program at the University of San Francisco. Based upon defense counsel's answer to the original malpractice complaint, I drafted a memorandum of points and authorities to counter my legal adversary's anticipated first line of defense, i.e. the statute of limitations on the filing of the malpractice action itself. See exhibit Z for a copy this class project with hand-written instructor comments (what attorneys refer to as marginalia).
>
> With the legal training from the University of San Francisco, I issued the vital discovery subpoena upon my former employer. The process server noted that the typed form that I had used did not have the stamped name of Grace K. Yamakawa, County Clerk. So, a handwritten deposition form had to be written by me in its place. (See Exhibit AA for a copy of the deposition subpoena and party notification).

(Petition for Writ of Error Coram Vobis pages 26 - 28)

For opposition legal counsel to claim *now* in statement to the U. S. Supreme Court that "Petitioner took no further steps to prosecute his legal malpractice action for more than three years" is, at best, disingenuous.

POINT IN OPPOSITION #2.

"[T]here is no authority that would mandate review or reversal of the California Superior Court's judgment of

dismissal for Petitioner's failure to prosecute." (Brief in Opposition to Petition for Writ of Certiorari – Page 5.)

REPLY TO POINT IN OPPOSITION #2.

This statement is simply not true. The California Supreme Court itself provided the basis for review and reversal and it was disclosed to opposition legal counsel in the Petition for Writ of Error Coram Vobis as follows:

> "In determining the reasonableness of [Petitioner-Plaintiff's] delay in filing the motion [to vacate judgment], this court is 'guided by the applicable statute of limitations for an action at law. . . . ' (cites omitted) Code of Civil Procedure section 338, subdivision 4 states that an action for relief on the ground of fraud must commence within three years of the aggrieved party's **discovery** of 'the facts constituting the fraud.' " *In re Marriage of Modnick*, 33 Cal. 3d 897, 9091 191 Cal. Rptr. 629 (emphasis added) Again, Petitioner-Plaintiff did not discover the frauds committed by Attorney-Defendant and his legal counsel until December 16, 1992, the date set for deposition of Petitioner-Plaintiff's former employer. "Where a judgment has been obtained through extrinsic fraud it may be set aside, though long since final. . . . " *Neubrand v. Superior Court*, 9 Cal. App. 3d 31, 88 Cal. Rptr. 586 (1970).

(Petition for Writ of Error Coram Vobis page 31.)

Obviously, the California Supreme Court used the discovery date to begin the running of the statute of limitations in order to ensure proper punishment of those parties and attorneys that would fraudulently abuse the judicial process. For opposition legal counsel to claim now that "there is no authority that would mandate review or reversal of the California Superior Court's judgment of dismissal for Petitioner's failure to prosecute" is, at best, disingenuous.

FINAL COMMENTS

In his petition to the U. S. Supreme Court, Petitioner asked a series of closely related questions that had been asked previously in petition to the Sixth District Court of Appeal and repeated to the California Supreme Court:

> And this Court of Appeal might also question why Attorney-Defendant and his legal counsel waited? Why did they wait until the uncontested hearing on their motion for involuntary dismissal of Plaintiff's malpractice lawsuit before claiming "He (Plaintiff) was never my client." Why was this "true" fact not the answer made by Attorney-Defendant's legal counsel to the original legal malpractice complaint? Wouldn't it have been better to end this "unmeritorious" legal malpractice lawsuit sooner rather than later?

(Petition for Writ of Certiorari – page 17.)

According to Rule 33 of the Rules of the Supreme Court of the United States (Sup. Ct. R. 33), opposition legal counsel in its brief in opposition had twenty-five pages available to answer this simple series of questions. Opposition legal counsel chose not to make any answer.

This case boils down to an examination of Exhibit "A," the book manuscript. The evidence is all there with the Sixth District Court of Appeal; it just has to be read. No honest, reasonable person reading the book manuscript could possibly believe that there was not a contract for legal services between the litigation parties. All charges and insinuations to the contrary are deceptive and groundless.

Respectfully submitted,

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